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In the Supreme Court

of the United States

OCTOBER TERM, 1928.

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants*.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTRODUCE THE EVIDENCE OF A. J. ABBOTT AND JAMES CRAIG, TAKEN IN A PRIOR CASE.

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13-8268

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STATEMENT.

The defendants for their brief in support of their motion to introduce in this case the evidence of A. J. Abbott and James Craig, taken in the case of *The Finney County Water Users' Association v. The Graham Ditch Company et al.*, in the United States district court for the district of Colorado, beg to submit as follows:

1.

The bill of complaint alleges the institution and prosecution of two suits by the defendant, The Finney County Water Users' Association, hereinafter for the sake of brevity designated as defendant Association, in the United States district court for the district of Colorado. The case of the defendant Association against the Graham Ditch Company *et al.*, was instituted in the latter part of 1916 for the purpose of obtaining a priority of its appropriation and

diversion of water from the Arkansas river in Kansas for irrigation purposes, as against a large number of irrigators taking water for the same purpose from the Arkansas river in Colorado. Motion to dismiss for want of equity was filed with the defendants in that case and argued orally. At that time the case of *Wyoming v. Colorado*, original, was pending in this court, involving the right of irrigators in one state to maintain their priority against irrigators on the upper part of the same river, in another state, and Judge Symes kept the case under advisement until it was finally decided (260 U. S. 1) in favor of the right of the lower appropriators to maintain their priority against subsequent appropriators in another state on the upper part of an interstate river.

In 1922 the defendant Association began, in the same court, its suit against the Coler Ditch Company *et al.*, appropriating and diverting water from the tributaries of the Arkansas river. There were about one hundred and fifty defendants in the latter case. Following the decision in *Wyoming v. Colorado*, Judge Symes overruled motions to dismiss each of these cases for want of equity, and the defendants were put to answer. A large amount of testimony was taken in the Graham Ditch Company case. Among others the deposition of Hon. A. J. Abbott was taken at Santa Fe, N. Mex., on the 17th day of February, 1923, and the testimony of James Craig was taken at Los Angeles, Cal., on the 12th day of February, 1923. Counsel who represented these defendants in this litigation were Hon. James Grafton Rogers, now assistant secretary of state, Mr. Fred A. Sabin, of Pueblo, and Mr. A. Watson McHendrie, of Trinidad, Colo. Mr. Sabin, as counsel for the defendant, appeared and cross-examined both of the witnesses above named.

II.

At the close of the taking of plaintiff's testimony in the Graham Ditch Company case in July, 1926, counsel for the defendants announced that they did not expect to take any testimony for the defendants in that case; that they were planning to have a suit brought by the state of Colorado covering the whole controversy; and the same counsel in connection with the then attorney-general of the state of Colorado, having secured permission to bring such suit, did institute this suit in this court. The purpose of this action is to prohibit and enjoin the defendant Association from further prosecuting the two suits above described and from making any claim whatever under its alleged right of appropriation, and to enjoin the state of Kansas and all of its citizens from further instituting any suits against the diversions of the water of the Arkansas river in Colorado, and in effect to quiet the title claimed by all of the irrigators of the Arkansas river basin in Colorado to all of the flow of the said river. There are other allegations as to numerous suits brought, but the purpose of the action is to determine the rights of the irrigators in Colorado as against the irrigators in Kansas, and to further determine the right of the citizens of the two states to the flow of this river.

III.

The state of Colorado in this suit appears as *parens patriæ* as was done by the state of Kansas in *Kansas v. Colorado* (206 U. S. 46). It appears in a representative capacity for the defendants who were impleaded by the defendant Association in the Graham Ditch case. The issues in effect are the same, although it is probably true that in the two cases above mentioned not all of the irrigators of the Arkansas river basin in Colorado were impleaded, but they are in the same class and related in the same way to the rights sought to be determined in this case.

IV.

After the issues were made up in this case the defendants here moved the court to make as additional party defendants the defendants in both of the two cases above mentioned, the Graham Ditch Company case and the Coler Ditch Company case. This motion was denied. No opinion was filed, but we are bound to assume that the motion was denied on the ground that these defendants were not necessary parties in this case; that they are in the case by representation, representation by the state of Colorado, which claims that under the constitution and laws of Colorado all flowing water in that state is public water and belongs to the state; and that it can only be appropriated, diverted and applied to beneficial use under the laws and regulations of the state of Colorado, and under the control and supervision of its administrative officers duly appointed for that purpose. Our understanding of the view of this court is that a decree in favor of or against the complainant would bind all of the irrigators in Colorado above described as effectively as though they were made parties defendant herein. This point is important and determinative of the issues raised by this motion.

V.

The motion seeks to introduce, offer and have admitted into the evidence in this case the deposition of A. J. Abbott, now deceased, and of James Craig, now a man of advanced years, who has refused because of that fact to again testify in this case. The point involved is whether this testimony taken in the Graham Ditch case may be introduced here with the same force and effect as though both witnesses were living and capable of testifying at this time. We proceed to the law in the matter.

VI.

The proposition advanced here is by no means novel. It has been before the courts many times, and there is a wealth of legal learning on it. There is an extensive discussion of that subject in 22 C. J., beginning on page 428, section 511, with a great number of citations. From this we give the following essentials necessary to the admission of the former evidence of witnesses in a subsequent trial.

(a) Identity of issue.

22 C. J. 430, sec. 515.

The issues in a former case must be practically the same as those in the subsequent trial, although the testimony need not apply to all of the issues, nor have like effect as to all of the defendants. It needs no argument to show such identity here, because it is alleged on the face of the bill of complaint that the issues in the case at bar, or nearly all of them, are identical with the issues in the Graham Ditch Company case.

(b) Identity of parties.

22 C. J. 428, secs. 513, 514.

It is not necessary that the litigation should be between the same parties. The word "parties" as here used is given a very broad significance. It includes not only the same parties, but representative officers in interest and privies of the parties in the original litigation.

In *Philadelphia W. & B. R. Co. v. Howard*, 13 Howard 307, this court held that evidence against a corporate defendant might be used against another corporation which had been formed by the consolidation of the defendant in a former case, and two other corporations.

We submit that the principle we contend for was declared in *Chirac v. Reinecker*, 2 Peters 613, 620, 621.

(c) Opportunity for cross-examination.

22 C. J. 431, sec. 516.

The fact that counsel for the opposing party had an opportunity to cross-examine the absent witness is most persuasive for the admission of such witness' testimony in a subsequent trial. In this case the testimony of these two witnesses was not taken *ex parte*, but upon notice. Mr. Sabin, attorney for complainant here, was attorney for the defendants there, and cross-examined Abbott and Craig at considerable length. If the two witnesses were able to testify at this trial, undoubtedly the evidence in chief would be exactly the same and the cross-examination would be the same.

(d) Death of witness.

22 C. J. 433, sec. 518.

This is a compelling cause for the admission of the testimony of a witness at a former trial because his evidence, of course, is not now procurable. This applies to Judge Abbott, who died three years ago.

(e) Inability to attend.

22 C. J. 436, sec. 523.

Inability of the witness to attend, by reason of age or illness, is another of the excuses for his nonproduction and the secondary use of his former evidence.

(f) Excuses for nonproduction of witness.

22 C. J. 431, sec. 517.

Here the discretion of the court is largely controlling, depending on the diligence shown by the party offering the evidence and of the circumstances, such as physical weakness, illness, besides the difficulty of procuring the evidence.

(g) Mr. Wigmore's discussion of the subject.

The principles which should govern the subject are well stated in 3 Wigmore on Evidence, second edition, sections 1387 and 1388. We quote portions of those sections:

"SEC. 1387. *Issue the same.* The *issue* on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested by cross-examination upon the point now in issue. Conversely, it is sufficient if the issue was the same, or substantially so for the purpose.

"The general rule in this shape is nowhere disputed. But there is naturally much variance shown in the strictness of its application in specific cases. The situation is one that calls for common sense and liberality in the application of the rule, and not a narrow and pedantic illiberality. On the whole, the judicial rulings show a liberal inclination to receive testimony already adequately tested; but there is yet room for much improvement. . . . ."

"SEC. 1388. *Parties or privies the same.* It is commonly said that the *parties* to the litigation in which the testimony was first given *must have been the same* as in the litigation in which it is now offered.

"But this limitation suffers in practice many modifications; and properly so, for it is not a strict and necessary deduction from the principle. At first sight, indeed, it seems fair enough to argue even that a person against whom former testimony is now offered should have to be satisfied with such cross-examination as any other person whatever, in another suit, may have chosen to employ. And it is entirely settled that in some such cases he must be satisfied, namely in cases where the other person was a privy in interest with the present party. The reason for such cases is that there the interest to sift the testimony thoroughly was the same for the other person as for the present person. The principle, then, is that where the interest of the person was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end. Thus, the requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue. It ought, then, to be sufficient to inquire *whether the former testimony was given upon such an issue that the party opponent in that case had the same*

interest and motive in his cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial-judge.

"Nevertheless the courts have not, in name at least, often gone so far as to accept so broad a principle.

"(1) It is well settled that the former testimony is receivable if the difference of parties consists merely in a difference of *nominal parties* only, or in an addition or subtraction on either side of parties not now concerned with the testimony.

"(2) It is well settled that the former testimony is receivable if the then party opponent, though a different person, had the *same property interest* that the present opponent has." . . .

In this case the state of Colorado has taken up the defense on the part of the defendants in the suit brought by the Finney County Water Users' Association, in the district court of Colorado, and with the consent of those defendants. The result of the pendency of this suit is that the issues presented in the case in the district court of Colorado are being litigated here, and the state of Colorado has taken the place as a party of the defendants in the suit in the district court. It is as much a continuation of the same litigation as if there had been a substitution of parties in a single suit.

The important point of an opportunity to cross-examine the witnesses Abbott and Craig is met by the consideration that Mr. Fred A. Sabin, one of the attorneys in this suit for the state of Colorado, acted as one of the attorneys for the defendant in the suit in the district court, and cross-examined the witnesses Abbott and Craig.

(h) Discretion of the court.

See citations, *supra.*

It is uniformly held that the admission of this secondary evidence is almost entirely within the discretion of the trial court and upon appeal error will not be predicated on such admission, unless it is clearly shown that the discretion of the court was abused.

Every such profert stands upon its own footing and its admission is to be governed by the principles of justice and the wholesome desire to ascertain the truth of the controversy, regardless of technicality. It will be noted that the strictness of the early rules has been very much modified in modern times. Many courts have gone to the extent of permitting a living witness to testify to the substance of the testimony of the dead or absent witness. That question, of course, does not arise here.

VII.

As to the admisibility of the testimony of A. J. Abbott, the dead witness, we are on even stronger grounds. We have brought ourselves within all the requirements. We have offered a literal transcript of the testimony of the witness, we have shown that the issues and the parties are identical, and the witness being dead his evidence cannot be produced; his evidence is material upon many points of the case, and as to the state of mind among the western Kansas irrigators no other witness can give this testimony. Judge Abbott was consulted as a judge of the district court of that district, himself a practical irrigator, on the possibility of the Kansas irrigators maintaining their rights as against the Colorado irrigators. He consulted Hon. Preston B. Plumb, then the United States Senator from Kansas, and a very able lawyer, who was himself interested in irrigation projects, and he gave it as his opinion that the Kansas irrigators could not successfully maintain a suit to enjoin a diversion of the water from the upper part of the river in Colorado, and in fact such right, the right to establish a priority upon the lower reaches of the river as against irrigators on the upper reaches in another state, was probably not definitely decided and established until the decision of this court in *Wyoming v. Colorado*, supra, in 1922.

As one of the law issues in this case will be the laches of the defendant Association and the state of Kansas, this testimony becomes very material. Laches is only imputed where the legal right upon which the party has slept is well settled. It is never imputed where the legal right is uncertain and has never been passed upon by the courts of last resort.

We submit that as to Judge Abbott's testimony the motion should be sustained.

VIII.

As to the testimony of James Craig, we know that it is impossible to bring Craig to Colorado or Kansas to take his testimony, owing to his advanced age. He is not incompetent mentally, so far as we know. We cannot and do not assert that to place him upon the stand, examine him in chief, and cross-examine him would injure his health. We cannot tell from the letter which he wrote us, refusing to testify, whether his refusal is based on danger to his health, physical weakness, or simply a whim of an old man who is tired of testifying in this litigation. He testified in *Kansas v. Colorado*, in United States Irrigating Company v. the same defendants as are impleaded in Graham Ditch Company case, and twice in the Graham Ditch case. He may well be excused if he is tired of testifying over and over again upon the same fact. But we have offered only the first twenty-five pages of his Los Angeles deposition, as shown by the record that is submitted and deposited with the clerk for the court's examination. This evidence is purely formal. We have omitted all his evidence as to the earlier water supply, its diversion in Colorado, and consequent injurious effect upon the Kansas irrigator. We have other and we think sufficient evidence upon this point, but James Craig is the only living witness who can testify to the original character of the defendant Association's ditch. He came to Kansas in 1879; he had had experience in

moving dirt, and he acted as the first superintendent in charge of the construction of this ditch. He testified as to the date of the commencement of this construction in 1880, when it was completed, and the date when the water was first put to beneficial use. He testified as to the intake of the ditch, the removal of the intake later to a point in Kearny county, the width of the ditch, the slope of its banks, its depth, its gradient, and its carrying capacity, and the amount of land that could be irrigated from it. We claim a priority from the beginning of the construction of the ditch. Craig's testimony shows that the construction was continuous until it was completed and the water turned into it.

Counsel for the defendants assert that if this motion is denied and Craig put on the stand his testimony in chief will be exactly like that offered here. His cross-examination will be the same and will throw no other light on the controversy. It will be necessary for counsel for the complainant and the defendants to make a long trip to Gridley, California, and take with them the stenographic commissioner and have him issue his compulsory process to compel Craig to go upon the stand. If he testifies it will be exactly the same evidence that we here desire to have admitted to the record. It might well be, when all of us arrive there, that the condition of his health will be such that he could not testify. Then we should, of course, have to renew this motion. There will be the expense of at least four lawyers, and of the stenographic commissioner and his per diem; probably very close to $1,000, outside of the time of the lawyers.

As to Craig's testimony, we are appealing to expediency rather than the positive ground of the impossibility of procuring his evidence. We are desirous of saving these litigants this sum which would be so uselessly expended.

We contend that no right of the complainant can be injuriously affected by the admission of this testimony.

The ruling desired here is, of course, not of substantive law. It is purely procedural, and it is well settled that as to procedural matters this court, sitting as a trial court, deals with such situations so as to avoid useless expenditure of time, labor and money. It applies established rules with great liberality and, if necessary, it makes new rules for its own government, in the interests of practicability and justice.

Respectfully submitted,

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